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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 1078 107

REX CARPENTER, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	3
Statement of the Case	4
Reason for Granting the Writ	8
Conclusion	21
Appendix	22
Opinion of the Court of Appeals	22
Opinion of the District Court Granting Summary Judgment	31
Opinion of the District Court Denying Motion to Dismiss	38

TABLE OF CITATIONS

CASES

Morgan v. United States, 304 U.S. 1, 82 L. Ed. 1129, 58 S. Ct. 773 15

Riverview Packing Company v. Reconstruction Finance Corporation, Em. App., 207 F.2d 415 ..... 7, 8, 9, 10, 12, 13, 14, 19

United States v. Carpenter, 3 Cir., 251 F.2d 775 ..... 7, 10, 11, 14

United States v. Carpenter, (D.C., W.D. Pa.) 147 F. Supp. 768 7

United States v. Carpenter, (D.C., W.D. Pa.) 137 F. Supp. 517 6

United States v. Howe (D.C., Mass.) 144 F. Supp. 342 16

United States v. Tambasco, (D.C., N.Y.) 144 F. Supp. 729 20

Table of Citations.

STATUTES — PAGE

Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. Appendix 901 et seq. 4, 18, 19

Act of June 30, 1944, 58 Stat. 639, 50 U.S.C.A. Appendix 924(e) 18, 19

Act of July 30, 1947, 61 Stat. 619, 50 U.S.C.A. Appendix 924(e) 18, 19

CONSTITUTION

Fifth Amendment 4

REGULATIONS

Livestock Slaughter Payments Regulation 3, 8 F.R. 10826 4

Revised Livestock Slaughter Payments Regulation 3, 10 F.R. 4241 4

Supplemental Order No. 189, Amendment 7, 18 F.R. 8698 18

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Rex Carpenter, a citizen of the United States and of the Commonwealth of Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above cause January 30, 1958, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The United States District Court for the Western District of Pennsylvania denied petitioner's motion to dismiss in an opinion reported at 137 F. Supp. 517 (1956), and granted the motion of the United States for

summary judgment in an opinion reported at 147 F. Supp. 768 (1957). Copies of these opinions appear on pages 31 and 38, respectively, of the Appendix attached to this petition.

In its opinion, reported at 251 F.2d 775, the United States Court of Appeals for The Third Circuit affirmed the judgment entered by the District Court. A copy of this opinion appears at page 22 of the Appendix attached to this petition.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered January 30, 1958. A petition for rehearing was filed in a timely manner on February 12, 1958, and was denied by an order entered February 21, 1958. The time for filing this petition has been duly extended to June 16, 1958, by an Order of this Court dated May 20, 1958. The judisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals in affirming the action of the District Court has held that a certain letter from an Examiner for the agency authorized by Congress to administer meat subsidies constituted a final dispositive order of the subsidy paying agency invalidating petitioner's subsidy claims, thereby holding that the only court having jurisdiction to pass upon the validity of the order is the Emergency Court of Appeals.

The first question is whether the presence in the alleged letter-order of two suggested alternative courses

of conduct for the slaughterer to follow, only one of which would finally dispose of the matter, would deprive the letter-order of the finality necessary not only to sustain the summary judgment but to sustain any claim for restitution of the subsidy payments?

The second question is whether the slaughterer has been deprived of his property without due process of law in violation of the Fifth Amendment to the Constitution of the United States by the subsidy-paying agency issuing a vague and deceptive order in which it purports to inform a slaughterer that his subsidy claims "have been declared invalid" and proceeds to advise him as to the future conduct he should take, but neglects to advise him of the most important step he can, and actually must take to protect his subsidy rights if the order is a final one, to-wit, the filing of a protest and upon dismissal thereof the filing of a complaint in the Emergency Court of Appeals, and by the United States of America waiting until eight years after the last correspondence between the parties, when the time during which the slaughterer was required to preserve his records had elapsed?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The various statutes, regulations and orders which form the background of this litigation are voluminous and have not been reproduced because neither their validity nor interpretation are in issue. Their effect is discussed in the opinions of the district and circuit courts which have been written in this case and will be subsequently referred to.

The relevant provision of the Constitution of the United States is the following portion of the Fifth Amendment:

> ". . . nor (shall any person) be deprived of life, liberty or property without due process of law, . . ."

STATEMENT OF THE CASE

Petitioner is and has been a meat slaughterer in Townville, Crawford County, Pennsylvania. Between January, 1944 and February, 1946, both inclusive, he applied for and received meat subsidy payments in amount of $34,593.43, as authorized by Section 2(e) of the Emergency Price Control Act of 1942 (50 U.S.C. App. 902(e)) and the various regulations and orders issued pursuant thereto. In order to expedite payment of the subsidies to the slaughterers the subsidy administering agencies would pay the subsidy claims as presented reserving the right to declare said claims invalid in whole or in part and to receive restitution if later investigation showed noncompliance with applicable regulations.(1) An examiner for the subsidy paying agency was apparently dissatisfied with petitioner's records and sent the following letter:

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(1)—See Livestock Slaughter Payments Regulations 3 of Defense Supples Corporation, Sections 7003.4, 7003.5 and 7003.10; 8 F.R. 10826 and Revised Regulation 3 of Reconstruction Finance Corporation, Sections 7003.4, 7003.9, and 7003.10; 10 F.R. 4241.

"OFFICE OF DEFENSE SUPPLIES

"October 29, 1946

"Mr. Rex Carpenter
"Townville, Pennsylvania Re: Meat Subsidy

"Dear Sir:

"In accordance with instructions from our Washington Office, this is to advise that all of your DS-T-55 claims through February 1946, have been declared invalid and that a claim receivable in the amount of $34,593.43 has been entered against these claims as per the attached T-608 adjustment sheets. This is occasioned by the fact that a recent field examination disclosed that your records did not sufficiently support the live weights, cost and dressed weights by grades as reported in these claims.

"You are given the alternative of either withdrawing these claims by return of the amounts paid thereon, together with interest at 4% per annum, or, supporting them at your own expense by the work of Independent Accountants approved by the Auditor and working under our supervision.

"You are further advised that all other claims through February, 1946 have been challenged because of insufficient records and that you will be informed later as to what, if any, corrective action will be necessary to clear these claims.

"Please let us hear from you immediately regarding your intentions and should you decide to support these claims through the work of an independent accountant, we suggest you contact this Agency re-

garding the various requirements prior to making any definite arrangements.

"Very truly yours,

"W. R. CLAY
"Examiner"

"Whittington/76

Other correspondence followed which is set out at length in the opinion of the Circuit Court on page 28 of the Appendix hereto. While we feel that these letters are significant, it is the letter of October 29, 1946, just quoted, which the United States has contended, and the Courts have held, to be a final dispositive order, invalidating petitioner's subsidy claims.

Nine years later, on August 29, 1955, the United States instituted this action to recover the subsidy payments. Jurisdiction of the Federal Court is based on Section 1345 of Title 28, United States Code, 62 Stat. 933. To the Complaint petitioner filed his motion to dismiss stating four grounds, among them that the letter of October 29, 1946 did not constitute a final determination of invalidity of his claims for meat subsidies. This motion was denied.(2) After petitioner's answer had been filed the United States moved for summary judgment on the ground that the letter of October 29, 1946 constituted a final order of invalidation of petitioner's claims, the validity of which could only be contested by the administrative procedure set up by the Emergency Price Control Act of 1942, from which an appeal could be taken to the Emergency Court of Appeals, and that since that

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(2)—United States of America v. Rex Carpenter, 137 F. Supp. 517 (1956).

procedure was not followed the validity of the order could not then be questioned as a defense to this action in the District Court, and thus no issue of fact could be raised in this action. The summary judgment in favor of the United States of America was granted.(3) The Circuit Court affirmed.(4)

Petitioner contends that *Riverview Packing Company v. Reconstruction Finance Corporation,* Em. App., 1953, 207 F.2d 415 is controlling in this case and that the Court of Appeals has read into the *Riverside* opinion something which it does not hold, thus creating a distinction without a difference.

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(3)—United States of America v. Rex Carpenter, 147 F. Supp. 768 (1957).

(4)—United States of America v. Rex Carpenter, Appellant, 251 F.2d 775 (1958).

REASONS FOR GRANTING THE WRIT

1. The Emergency Court of Appeals, in *Riverview Packing Company v. Reconstruction Finance Corporation, supra,* construed the language of three letters issued by the subsidy paying agency, holding in turn, that each letter failed to meet the requirements of a final order of invalidation of subsidy claims necessary to give it jurisdiction to hear the cause. A fourth letter was approved as a final order. All of the elements which that court found objectionable are present in the letter in this case, dated October 29, 1946 and hereinbefore set forth, which the Court of Appeals held to be a final order of invalidation of petitioner's subsidy claims.

The Emergency Court of Appeals made this explanatory statement at page 418 of the reported opinion which points up the consequences of finality of a letter-order in this situation:

> ". . . The powers of this court are purely statutory and, as we have indicated, when invoked as here under section 204(a) of the Emergency Price Control Act they are limited to the review of regulations or orders issued under section 2 of the Act. We have held that Revised Livestock Slaughter Payments Regulation No. 3 and its predecessor Livestock Slaughter Payments Regulation No. 3 are regulations issued under section 2(e) of the Act and that a determination by the Reconstruction Finance Corporation invalidating under the regulation a claim for a subsidy made thereunder is itself an order under section 2(e) of the Emergency Price Control Act which is subject to the protest and review procedure of sections 203(a) and 204(a) of

> the Act. We have not thought that such a determination need be in any particular form and have regarded action by the respondent as a reviewable order when incorporated in a letter or memorandum. In order to present a reviewable question to this court, however, there must be a definite order in some form which has finally invalidated the subsidy claims in question. . . ."

If the letter-order is not a final one the procedure under sections 203(a) and 204(a) of the Emergency Price Control Act of 1942 is not available and not only was the summary judgment improperly entered for the plaintiff, but its entire case must fail.

The first letter passed upon in the *Riverview* case and held not to be a final order of invalidation was dated October 1, 1945. It is from the deputy director of the Office of Defense Supplies to the acting assistant manager of its New York office and is quoted in part beginning at page 418 of the reported opinion. It contained this language:

> ". . . Consequently, the applicant should be given two alternatives; one, to withdraw the claims for the periods of February through July, 1945, inclusive and to make restitution of all amounts paid on these claims. If the slaughterer chooses this alternative, RFC will take no further action. The second alternative is for the slaughterer to have an audit made in support of his claims. This audit should, of course, be made at the appellant's expense and by an independent public accountant acceptable to this office your supervision. If this latter alternative is accepted, it should be made quite clear to

the applicant that we should not necessarily accept corrected claims if the audit report does not support the original claims."

Of this portion of the letter the court had this comment at page 419 of the reported opinion:

> "We think it is quite clear that the letter of October 1, 1945 does not embody a definite or final order of invalidation. On the contrary it indicates that the respondent intended to give the complainant the alternatives of either withdrawing its claims and making restitution of the amounts paid on them or of having an independent audit made in support of the claims. The latter, as we have seen, is the course which the complainant actually followed and, as the transcript discloses, the claims in question were subsequently given further consideration in the light of the report of the accountants which the complainant employed at the respondent's suggestion."

The letter in the subject case, dated October 29, 1946 and hereinbefore quoted in full, contained these words:

> "You are given the alternative of either withdrawing these claims by return of the amounts paid thereon, together wth interest at 4% per annum, or, supporting them at your own expense by the work of Independent Accountants approved by the Chief Auditor and working under our supervision."

Of this the Court of Appeals said at page 778 of 251 F.2d (Appendix page 26):

> ". . . The letter advised the defendant that his 'DS-T-55 claims through February 1946, have

been declared invalid and that a claim receivable in the amount of $34,593.43 has been entered against these claims'. By way of explanation the letter stated that 'This is occasioned by the fact that a recent field examination disclosed that your records did not sufficiently support the live weights, cost and dressed weights by grades as reported in these claims'. We do not agree with the defendant that the letter was deprived of its finality because the defendant was given the alternative of making restitution or verifying his figures by an independent audit. The effect of the latter course was to advise the defendant of the manner in which he could secure further consideration by the agency of the invalidated claims. Its effect was merely to give him an opportunity to seek reconsideration of the order of invalidation. However, unless he took advantage of that opportunity the order of invalidation stood. The letter-order in this case is thus clearly distinguishable from those involved in Riverview Packing Co. v. Reconstruction Finance Corporation, Em. App. 1953, 207 F. 2d 415, the case upon which the defendant strongly relies."

". . . The Emergency Court of Appeals held that the letter thus granting alternative courses, together with the fact that the slaughterer had accepted the second alternative which left something more for the agency to do, namely, to accept or reject the independent audit, prevented the letter from constituting a final order of invalidation. . . ."

Here we feel that the Court of Appeals has created a distinction without a difference. The Court of Appeals

said that the letter-order in this case was clearly distinguishable from the one in the *Riverview* case because the slaughterer in that case chose the alternative of an independent audit. But that is not a difference in the letter-order; that is a difference in what was done pursuant to it. As to its finality, the letter-order must stand on its own language at the time it was issued. This is the first time, insofar as we have been able to ascertain, that any court has advanced the theory that the conduct of the slaughterer subsequent to the issuance of one of these vague letters by the subsidy paying agency had any bearing on or in any way affected the finality of letter as a dispositive order.

The foregoing is accentuated by the comments of the Emergency Court of Appeals in passing upon the second letter in the *Riverview* case which it found not to be final. The letter, dated May 21, 1946, was from the acting assistant manager of the New York agency to the slaughterer, and is quoted at some length beginning on page 419 of the reported opinion. The decisive words were:

> ". . . Claims for subsidy based on sales weights at such variance with Federal Grading are, therefore, invalid.
>
> "Consequently, the following courses of action are open to you insofar as the claims for cattle slaughter filed with this office on which payments have been made:
>
> "1. Explain the discrepancies to our satisfaction.
>
> "2. Obtain a ruling in writing from the National Office of OPA to the effect that claims filed

on Forms DS-T-55 showing chilled carcass weights by grades as derived from sale and inventory records are acceptable to that office as a basis of reporting.

"3. Withdraw all cattle claims filed on Forms DS-T-55 and make restitution to the Reconstruction Finance Corporation on all amounts paid thereon."

This comment by the court immediately followed on page 420:

"It is true that this letter does state that "Claims for subsidy based on sales weights at such variance with Federal Grading are therefore invalid." Standing alone this statement might conceivably be construed as an order invalidating the complainant's subsidy claims which were then under consideration. But it does not stand alone. On the contrary other statements contained in the letter taken with what followed later make it entirely clear that the letter was not intended to be a definite or final invalidation of the subsidy claims. In the letter itself immediately following the statement just quoted appears the suggestion that three courses of action were open to the complainant, only one of which, the third, would involve the invalidation and withdrawal of the claims. If the complainant should be able to explain the discrepancies in the claims to the satisfaction of the respondent or if it should obtain a written ruling from the Office of Price Administration that the claims as filed were acceptable to that office as a basis of reporting it is clear from the letter that the claims might be allowed and paid."

Here again no mention is made of what was done pursuant to the letter; the only discussion is of the language of the letter itself. It is important to observe that here the court refused to look only to a part of the letter, but said that the letter must be construed as an entirety. It held that the words of invalidation of subsidy claims could not be construed out of context and where the context included alternative courses of future conduct with regard to the subsidies supposedly invalidated this was fatal to final invalidation and amounted only to a letter of advice.

The Court of Appeals disposed of this holding in one brief sentence. It said at page 778 of the reported opinion (Appendix page 27):

> ". . . The (Emergency) court (of Appeals) found the second letter to be one of advice as to future action with respect to the claims and not a definite and final invalidation. . . "

With this statement we take no issue, but feel that an analysis of the reasons for the conclusion of the Emergency Court of Appeals make it impossible to sustain the holding of the Court of Appeals in this case.

A third letter, dated June 25, 1951, was also passed upon and found wanting by the Emergency Court of Appeals in the *Riverview* case. It stated that "it has been determined that the slaughterer's cattle claims for this period are invalid". The court commented as follows:

> ". . . It will be observed that this statement is not in the present tense. It was, therefore undoubtedly intended as a description of the prior action of the respondent, albeit an inaccurate one

as we have seen, and not as an independent determination of the invalidity of the subsidy claims in question. . . ."

The letter to petitioner is in the same tense as that disapproved by the Emergency Court of Appeals and should be subject to the same inference. The Court of Appeals completely disregarded this in its opinion.

2. Petitioner has been deprived of his property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America by virtue of the conduct of the United States and its agencies.

The language used by Mr. Chief Justice Hughes in *Morgan v. United States,* 304 U.S. 1; 58 S. Ct. 773 (1938) defines the duty of public servants employed by administrative agencies. While the issue in that case was whether the Secretary of Agriculture had granted a "full hearing", the general principles set forth apply equally to all administrative procedures. It was stated beginning on page 14:

> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail can not be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the

liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. . . ."

At page 18 it was stated:

". . . Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. . . ."

The case most nearly in point is *United States v. Howe, D. C.*, 144 F. Supp. 342 (1956). The court held that Howe was denied procedural due process by his local selective service board because it mis-advised him of his procedural rights and failed to appoint advisors as required by statute. The opinion concludes:

"In the present case there is substantial reason for believing that defendant may have been prejudiced by what occurred. It is for the local board, of course, and not for this court, to decide whether his claim to deferment should have been allowed. But he did have a right to present such a claim, with evidence to support it, and have it passed upon by the board. The incorrect information given him misled him as to his right to assert his claim, and the failure to name the advisors required by the regulations deprived him of the assistance to which he was entitled. Had the advisors been named, and

had their names been properly posted in the office, he could readily have sought their aid, been correctly advised and enabled to make a proper application which could have resulted in his reclassification by the local board. In the circumstances it must be found that defendant has been denied the procedural due process guaranteed by the regulations and has been substantially prejudiced by such denial."

The letter from the Office of Defense Supplies to petitioner dated October 29, 1946 and hereinbefore quoted, after stating that certain subsidy claims "have been declared invalid", advises him:

> "You are given the alternative of either withdrawing these claims by return of the amounts paid thereon, together with interest at 4% per annum or supporting them at your own expense by the work of Independent Accountants approved by the Chief Auditor and working under our supervision."

Basic fairness and morality, as well as the foregoing authorities, require that the Office of Defense Supplies, by assuming to advise petitioner of his rights and obligations, should have advised him of all of them. If petitioner elected neither of the courses of conduct, and if the letter was a final order of invalidation of his claims, petitioner still had the right to file a protest and prosecute an appeal to the Emergency Court of Appeals if necessary. This alternative was not mentioned and one would not be out of order in wondering why.

Attorneys and Courts have been unable to agree as to the meaning of these vague, misleading letters issued by the subsidy-paying agency. It seems to place too high a degree of responsibility on a layman dealing with

persons occupying positions of public trust to require him at his peril to construe such documents. It is more realistic to infer that he relied, as he should have every right to do, on the public servant not to lead him into a trap. It is impossible to say or show what petitioner would have done if he had been advised to file his protest, but that impossibility merely points up the manifest injustice of its omission from the letter. It is likewise impossible to say what course of conduct petitioner would have followed if the letter had contained no advice, but that points up the injustice of the half-truths supplied him.

The vagueness of the letter of October 29, 1946, together with the failure of the Court of Appeals to follow the language of the *Riverview* case has further operated to apparently deny petitioner his right to proceed under the Act of June 30, 1944 (58 Stat. 639) as amended by the Act of July 30, 1947 (61 Stat. 619) 50 U.S.C.A. Appendix 924(e).

This unfairness is magnified by the fact that the United States waited until eight years after its last correspondence with petitioner and nine years after the letter-order in question to institute this action. During that time the period elapsed during which slaughterers were required to maintain their records. See Amendment No. 7 to Supplemental Order No. 189 (18 F.R. 8698). The lack of a statute of limitations should not be construed as a license to litigate at any time. Fairness requires and due process of law should require that civil actions be brought by the United States within a reasonable time. A period beyond which the United States, itself, had required records to be preserved would appear

to be unreasonable, particularly since the procedure of June 30, 1944 (58 Stat. 539) as amended by the Act of July 30, 1947 (61 Stat. 619) supra apparently was still available to petitioner.

Petitioner feels that the holding of the Court of Appeals in this case and the holding of the Emergency Court of Appeals in *Riverview Packing Company v. Reconstruction Finance Corporation* are directly conflicting, notwithstanding the efforts of the Court of Appeals to rationalize them. The language of the *Riverview* case simply is not reasonably subject to the construction placed on it by the Court of Appeals. The result is that the Emergency Court of Appeals has held that the existence of certain suggested alternative courses of future conduct in a letter to a slaughterer preclude that letter from being a final dispositive order, thus denying it jurisdiction to hear the cause. Now the Court of Appeals has held that a similar letter containing the same suggested alternatives is a final dispositive order which precludes it from hearing the slaughterer's case.

A ruling in this case would govern the form of informal letter-orders issued by any administrative agency. In addition, it would clarify the law to be applied to similar pending or future actions or settlements regarding restitution of meat subsidies. We have no way of knowing the number of such claims which may now be pending or may yet be commenced.

Civil litigation by the United States for the restitution of meat subsidies has been troublesome to numerous courts who have found it necessary to adjudicate the rights of the parties involved. Judge Foley, in the course of his opinion in *United States of America v. Tambasco,* D.C., 144 F. Supp. 729 at page 730 states:

"These matters are difficult for me because they relate back to events that happened so long ago. Further, there is the fear that some citizen, no matter how wrong he may be, has been deprived of administrative or judicial review. There is also the paradox presented by the contention that this Court has no power or jurisdiction to delve into the merits or background of the factual situation because judicial review is vested in the Emergency Court of Appeals by Section 204(d), 50 U.S.C.A. Appendix, §924(d), as to validity of any regulation or order, but does have enforcing jurisdiction to grant summary judgment for large amounts of money solely upon exhibits surrounded by the aura of officialdom. To me it is an uncomfortable feeling, because there is always the fear that administrative and authorized judicial review might have uncovered some mistake not readily apparent in cold records. It may be I am unduly alarmed because official records possess inherent integrity, and in this massive program the procedures for protest and review were adequate and present to be taken advantage of."

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court.

(Filed January 30, 1958)

By MARIS, Circuit Judge.

This is a civil action brought in the District Court for the Western District of Pennsylvania by the Government against the defendant, Rex Carpenter, a livestock slaughterer, for the restitution of meat subsidy payments in the sum of $34,593.50, together with 4% interest from the dates of disbursement. The defendant appeals from a summary judgment entered on the pleadings in favor of the Government.

The subsidy payments in controversy were made upon meat produced from the slaughter of livestock on claims filed for the period January, 1944 through February, 1946, in the amount of $34,593.50, pursuant to the meat subsidy program set up under Section 2(e) of the Emergency Price Control Act of 1942 as amended, 50 U.S.C.A. Appendix § 902(e), and conducted by the Defense Supplies Corporation, under its Livestock Slaughter Payments Regulation 3[1] and Revised Regulation 3[2] and by its successor, Reconstruction Finance Corporation.[3] Payments were made to the slaughterer upon preliminary approval subject to the right of the agency to declare the subsidy claims invalid in whole or

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1. 8 F.R. 10826; 15799; 9 F. R. 1820; 1821.

2. 10 F.R. 4241; 7539; 8073; 10 F.R. 11153; 11154.

3. 10 F.R. 11155. See also Directive 41 of the Office of Economic Stabilization, 10 F.R. 4494; 11 F.R. 1215.

in part upon noncompliance with the regulations and to require restitution of the subsidy payments made.[4] Under the Emergency Price Control Act final orders of invalidation of subsidy claims were reviewable only by the Emergency Court of Appeals and may not be attacked in any other court.[5]

The complaint charged that by a letter of October 29, 1946 the Reconstruction Finance Corporation advised the defendant that certain of his subsidy claims had been declared invalid and that a claim receivable in the amount of $34,593.43 had been entered against those claims because they were not sufficiently supported by the defendant's records. The defendant was given two alternate courses; either to withdraw the claims and return the amounts paid thereon or to support them at his own expense through the work of independent ac-

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4. §§ 7003.4, 7003.5 and 7003.10 of Regulation 3, 8 F.R. 10827-10829; §§ 7003.4, 7003.9 and 7003.10 of Revised Regulation 3, 10 F.R. 4241-4243.

For extended discussions of this program see Armour & Co. v. Bowles, Em. App. 1945, 148 F. 2d 529, cert. den. 325 U.S. 871; Illinois Packing Co. v. Snyder, Em. App. 1945, 151 F. 2d 337; Earl C. Gibbs, Inc. v. Defense Supplies Corporation, Em. App. 1946, 155 F 2d 525, cert. den. 329 U.S. 737; Wm. Schluderburg-T. J. Kurdle Co. v. Reconstruction, Etc., Em. App. 1948, 169 F. 2d 419, cert. den. 335 U.S. 846; Earl C. Gibbs v. Reconstruction Finance Corp., Em. App. 1948, 169 F. 2d 654; Merchants Packing Co. v. Reconstruction Finance Corp., Em. App. 1949, 176 F. 2d 908; Evergreen Meat Co. v. Reconstruction Finance Corp., Em. App. 1951, 188 F. 2d 368.

5. Riverview Packing Co. v. Reconstruction Finance Corp., 3 Cir. 1953, 207 F. 2d 361; United States v. Schneer's Atlanta, Inc., 1957, 352 U.S. 978.

countants approved by the Chief Auditor of the agency and working under the agency's supervision.[6] The Complaint further charged that a second letter was sent to the defendant under date of January 8, 1948 in which he

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6. "October 29, 1946

Mr. Rex Carpenter
Townville, Pennsylvania

Re: Meat Subsidy

Dear Sir:

In accordance with instructions from our Washington Office, this is to advise that all of your DS-T-55 claims through February 1946, have been declared invalid and that a claim receivable in the amount of $34,593.43 has been entered against these claims as per the attached T-608 adjustment sheets. This is occasioned by the fact that a recent field examination disclosed that your records did not sufficiently support the live weights, cost and dressed weights by grades as reported in these claims.

You are given the alternative of either withdrawing these claims by return of the amounts paid thereon, together with interest at 4% per annum, or, supporting them at your own expense by the work of Independent Accountants approved by the Chief Auditor and working under our supervision.

You are further advised that all other claims through February, 1946 have been challenged because of insufficient records and that you will be informed later as to what, if any, corrective action will be necessary to clear those claims.

Please let us hear from you immediately regarding your intentions and should you decide to support these claims through the work of an independent accountant, we suggest you contact this Agency regarding the various requirements prior to making any definite arrangements.

Very truly yours,

W. R. Clay
Examiner"

was advised that not having heard from him in response to the agency's requests for settlement of his indebtedness the case was being forwarded to Washington with the recommendation that it be referred to the Department of Justice.[7]

The defendant filed a motion to dismiss the complaint which was denied by the district court. 137 F. Supp. 517. Thereupon the defendant filed his answer asserting that the letters of October 29, 1946 and January 8, 1948 did not constitute invalidating orders, that the RFC acted in an arbitrary, capricious and unreasonable manner in the inspection of his books and records, that he had complied with the regulations by preserving all the required records through January 1, 1955 and that his records were complete, accurate and adequate. The Government filed a motion for summary judgment alleging that the defendant's answer did not raise any material issue of fact. The district court concluded that the

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7. "January 8, 1948

Mr. Rex Carpenter
Townville
Pennsylvania

Re: Meat Subsidy
Claim Receivable $34,593.43

Dear Mr. Carpenter:

Not having heard from you in response to our various requests for settlement of your indebtedness totalling $34,593.43, plus accrued interest, this is to notify you that the case is being forwarded to our Washington office with the recommendation that the same be referred to the Department of Justice.

Very truly yours,

W. R. Clay
Examiner."

letter of October 29, 1946 was an order issued under section 2(e) of the Emergency Price Control Act of a definite and final nature, the validity of which could be reviewed only by the Emergency Court of Appeals. Accordingly the Government's motion for summary judgment was granted and judgment was entered against the defendant in the amount of $34,593.43 with interest. 147 F. Supp. 768. This appeal followed.

The defendant here seeks reversal of the judgment on the ground that the agency's letter of October 29, 1946 giving the defendant the alternatives of making restitution or verifying his figures by an independent audit did not constitute a final administrative invalidation of his meat subsidy claims. The Government, on the other hand, contends that the letter was a binding determination of the defendant's liability. We agree. The letter advised the defendant that his "DS-T-55 claims through February 1946, have been declared invalid and that a claim receivable in the amount of $34,593.43 has been entered against these claims". By way of explanation the letter stated that "This is occasioned by the fact that a recent field examination disclosed that your records did not sufficiently support the live weights, cost and dressed weights by grades as reported in these claims". We do not agree with the defendant that the letter was deprived of its finality because the defendant was given the alternative of making restitution or verifying his figures by an independent audit. The effect of the latter course was to advise the defendant of the manner in which he could secure further consideration by the agency of the invalidated claims. Its effect was merely to give him an opportunity to seek reconsideration of the order of invalidation. However, unless he

took advantage of that opportunity the order of invalidation stood. The letter-order in this case is thus clearly distinguishable from those involved in Riverview Packing Co. v. Reconstruction Finance Corporation, Em. App. 1953, 207 F. 2d 415, the case upon which the defendant strongly relies.

In the Riverview Packing Co. case the Government relied upon two letters which it regarded as embodying reviewable orders invalidating the slaughterer's subsidy claims. The first letter, an intra-agency communication, merely described the procedure to be followed by the agency in notifying the slaughterer of the alternatives open to it. It was not an order to the slaughterer invalidating his subsidy claims. The slaughterer was notified by the Reconstruction Finance Corporation of the alternate courses open to it, namely, of withdrawing its claims and making restitution or of supporting the claims by an independent audit, and it adopted the second course and retained, with the approval of the agency, an accounting firm to make the audit. 207 F. 2d 415, 419. The Emergency Court of Appeals held that the letter thus granting alternative courses, together with the fact that the slaughterer had accepted the second alternative which left something more for the agency to do, namely, to accept or reject the independent audit, prevented the letter from constituting a final order of invalidation. The court found the second letter to be one of advice as to future action with respect to the claims and not a definite and final invalidation. Furthermore a third letter clearly showed that the agency was then still conducting an examination of all of the subsidy claims including those which it alleged had been finally invalidated. Under those circumstances the court determined that no final reviewable order remained for it to consider.

In the present case the defendant did not in the district court contend that he had chosen the alternative of supporting his claims with an independent audit or that the Reconstruction Finance Corporation had conducted any independent examination after the letter of October 29, 1946. On the contrary, in his motion for dismissal of the complaint he alleged that when he visited Mr. Clay after receipt of the letter of October 29th he had denied the violation of any OPA regulation and had affirmed that his records were sufficient and proper. We think that the intent of the agency was clear from its letter of October 29, 1946 and that there was nothing equivocal in he language of that letter advising the defendant that his claims had been "declared invalid" and a claim receivable of $34,593.43 set up against him. The defendant failed to avail himself of the procedure set out in the Emergency Price Control Act for review of the validity of that letter-order and the district court accordingly did not err in finding that the validity of the order was not open for review in these proceedings.

At the bar of this court two other letters were produced by counsel for the defendant. One of these was a letter to the defendant from the agency dated May 21, 1947[8] and the other a copy of a letter from the defendant

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8. "May 21, 1947

Refer: W. R. Clay

Mr. Rex Carpenter
Townville, Pennsylvania

Re: Meat Subsidy

Dear Mr. Carpenter:

Since you and Mr. Sigler, your bookkeeper, visited this office on February 27, 1947, we have not heard from you relative to the information you could assemble which

to the agency dated May 31, 1947.[9] Counsel have stipulated that these letters, which have just come to light, may be considered as part of the record in this case. We do not think, however, that they help the defendant's cause. While it is true that it appears from them that

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would enable a satisfactory independent audit to be made.

To date, we have not received the profit and loss statement which you agreed to forward to us as soon as possible. At the time of your visit, it was suggested to you that you submit some plan for repayment of our claim receivable. You have failed to advise as to how you intended to repay the amount involved.

This is to advise that unless we hear from you within the next ten days, it is our intention to refer the entire matter to our Washington Office for instructions as to how to proceed.

Very truly yours,

W. R. Clay,
Examiner."

9. "May 31, 1947

Reconstruction Finance Corporation
Federal Reserve Bank Building
Cleveland 1, Ohio
Attn: Mr. W. R. Clay

Dear Sir:

Reference W. R. Clay's letter of May 21, 1947.

At the present date we are still attempting to gather the information you requested at our last visit to your Office.

We are making progress on this data although it has turned out to be a very slow and tedious job and will take considerably more time than we at first expected.

We hope you will find it possible to grant us an extension of time on this matter.

Very truly yours,

Rex Carpenter"

the defendant was assembling some information which "would enable a satisfactory independent audit to be made" it does not appear that he had chosen that alternative course, with the permission of the agency, as did the slaughterer in the Riverview Packing Co. case. On the contrary, it appears that there was some discussion in respect to repaying the invalidated subsidies since the letter of May 21, 1947 refers to a suggested "plan for repayment of our claim receivable." The final paragraph of that letter disclosing the intention of the agency to refer the matter to the Washington Office for "instructions as to how to proceed" does not detract from the finality of the letter of October 29, 1946. The letter of the defendant of May 31, 1947 adds nothing which aids his position since it merely asks for further time in which to gather information which it appears was never gathered or submitted to the agency.

The judgment of the district court will be affirmed.

Opinion.

WALLACE S. GOURLEY, Chief Judge:

This matter comes before the court on motion of United States of America for summary judgment.

Summary judgment may not be granted if there be an issue presented as to the existence of any material facts; and all doubts as to existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment. Sarnoff v. Ciaglia, 165 F. 2d 167 (3 Cir.); F. A. R. Liquidating Corp. v. Brownell, 209 F. 2d 375 (3 Cir.); Frederick Hart & Co. v Recordgraph Corp, 169 F. 2d 580 (3 Cir.).

The determination of the motion must rest on the following question:

Did the Reconstruction Finance Corporation or the governmental agency vested with authority to determine the validity of subsidy claims enter or make an order of a definite and final nature relative to the subsidy claims involved in the procedure?

If the answer is in the affirmative, the Emergency Court of Appeals specially constituted by Congress to review matters of this nature is the only court to which the defendant had recourse to determine the validity of such order. Riverview Packing Co., Inc. v. Reconstruction Finance Corp., 207 F. 2d 415; Riverview Packing Co., Inc. v. Reconstruction Finance Corp., 207 F. 2d 361 (3 Cir.).

If the answer to the question posed is in the negative, the District Court would have full authority to consider on the merits the validity of the claim involved in the instant proceeding.

The government's claim is for restitution of subsidies paid by it to the defendant, a livestock slaughterer, pursuant to Section 2(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 902(e)).

Under the second proviso of this section a meat subsidy program was instituted in June 1943 as an incident of the price control and overall economic stabilization program. The program was in operation until October 15, 1946 except for the brief period between July 1 and July 25, 1946. Meat price regulations were re-imposed with respect to slaughterers on September 1, 1946. (11 F.R. 9372.) The purpose of the subsidy was to relieve the "squeeze" upon slaughterers and wholesalers applied by uncontrolled live cattle prices and controlled meat prices.

Authority overall economic policy was vested by the President in the Office of Economic Stabilization (Executive Order 9250, 7 F.R. 7871) pursuant to the Stabilization Act of 1942 (56 Stat. 765, 50 U.S.C. App. 961, 962). The Defense Supplies Corporation, organized under Section 5(d) of the Reconstruction Finance Corporation Act, and therefore a corporation authorized to administer such programs under the Emergency Price Control Act was the original administrative agency for the meat subsidy program. On June 30, 1945 this corporation was terminated and its functions and

assets transferred to the Reconstruction Finance Corporation by joint resolution of Congress. (59 Stat. 310).

Section 4 of Regulation No. 3 (8 F.R. 10826) and Section 7003.4 of Revised Regulation No. 3 (10 F.R. 4241) provide that records supporting the subsidy claims shall be preserved for inspection during the times herein stated, and that upon failure of compliance with this section the administrative agency shall have the right to invalidate the claims for the affected reporting periods. Amendment No. 7 to Supplemental Order No. 189 (18 F.R. 8698) issued jointly by the Department of Agriculture, the Reconstruction Finance Corporation and the Department of Commerce, effective January 1, 1954, extends the period for the preservation of records to January 1, 1955. On October 29, 1946 the Reconstruction Finance Corporation determined that the defendant failed to comply with the terms of this section for the period of January 1944 through February 1946 inclusive, and therefore invalidated the respective claims. The claims had previously been paid upon preliminary approval only, in the total amount of $34,593.43, for which a claim receivable was established.

It is not disputed by the defendant that an appeal was not taken to the Emergency Court of Appeals from the informal letter decision of October 29, 1946, in which the defendant was advised by a representative of the governmental agency that the records of the defendant did not sufficiently support the live weights, cost and dressed weights by grades as reported in the claims filed by the defendant with the governmental agency, and in connection with which the amount was paid to the defendant for which the instant proceeding was filed

claiming judgment against the defendant for said amount.[1]

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1. "OFFICE OF DEFENSE SUPPLIES

"October 29, 1946

"Mr. Rex Carpenter
"Townville, Pennsylvania Re: Meat Subsidy

"Dear Sir:

"In accordance with instructions from our Washington Office, this is to advise that all of your DS-T-55 claims through February 1946, have been declared invalid and that a claim receivable in the amount of $34,593.43 has been entered against these claims as per the attached T-608 adjustment sheets. This is occasioned by the fact that a recent field examination disclosed that your records did not sufficiently support the live weights, cost and dressed weights by grades as reported in these claims.

"You are given the alternative of either withdrawing these claims by return of the amounts paid thereon, together with interest at 4% per annum, or, supporting them at your own expense by the work of Independent Accountants approved by the Chief Auditor and working under our supervision.

"You are further advised that all other claims through February, 1946 have been challenged because of insufficient records and that you will be informed later as to what, if any, corrective action will be necessary to clear these claims.

"Please let us hear from you immediately regarding your intentions and should you decide to support these claims through the work of an independent accountant, we suggest you contact this Agency regarding the various requirements prior to making any definite arrangements.

"Very truly yours,

"W. R. Clay
"Examiner"

"Whittington/76

A determination must, therefore, be made as to whether or not the defendant, through the appropriate governmental agency, has issued an order of a character sufficiently definite and final to be the subject of protest and review invalidating the subsidy claims for the reason that said claims were inaccurate and did not properly reflect the meat producer and slaughterer merchant operations.

If the governmental agency did not make or issue any order of a character sufficiently definite and final to be the subject of protest and review, which invalidated the meat slaughterer's subsidy claim upon the ground that his records were inaccurate and did not properly reflect the meat slaughter's operations, the District Court has the jurisdiction and the authority to determine the merits of the meat slaughterer's claim or the government's claim against the meat slaughterer as to the validity or nonvalidity of the claim and whether proper records were kept and maintained. However, if an order of a definite and final character were issued by the governmental agency in connection with the meat subsidy claims, in that event the meat slaughterer is unable to question the validity of such an order in the District Court and must resort to the Emergency Court of Appeals for review of said order.

However, any order issued by the Reconstruction Finance Corporation or the governmental agency authorized and empowered to administer subsidy payments to slaughterers places a limitation on the power of the District Court. In exercising its jurisdiction, the District Court is precluded from questioning the validity of the various provisions of the meat subsidy reg-

ulations which amount to orders issued by such agency since orders so issued are subject to review only by the Emergency Court of Appeals. As to any subsidy, the duty of the District Court is merely to interpret and apply them to the facts of said case. Riverview Packing Co. v. Reconstruction Finance Corp., 207 F. 2d 361 (3 Cir.)

The law is settled that determinations by the Reconstruction Finance Corporation in validating subsidy claims, even though informally expressed, are orders issued under Section 2(e) of the Emergency Price Control Act. Riverview Packing Co. v. Reconstruction Finance Corp., 207 F. 2d 361 (3 Cir.)

I must conclude from a reading of the letter written to the meat slaughterer defendant on October 29, 1946, that said letter was a sufficient order which advised the meat slaughterer defendant that sufficient records were not maintained to support the live weights, cost and dress weights by grades as recorded by the claims filed.

Since administrative decisions are final except for statutory provision for review which was vested exclusively in the Emergency Court of Appeals, the District Court in interpreting and applying said order to the facts of the instant case must conclude that said order, not having been contested before the proper tribunal, remains legally enforceable and the United States of America is entitled to judgment on the pleadings.

In the entry of judgment it is proper to allow interest at the rate of 4% per annum on claims made by the United States of America to a meat slaughterer

from the date that said payment was made on payments determined to be invalid.

An appropriate Order is entered.

ORDER

AND NOW, this 24 day of January, 1957, the motion for summary judgment will be, and it hereby is, granted and judgment is entered in favor of the United States of America, plaintiff, and against Rex Carpenter, defendant; in the amount of $34,593.43 with interest at the rate of 4% per annum, together with costs.

The United States of America is directed to submit to the court the dates and amounts that were paid by the United States of America to the defendant, Rex Carpenter, under proper certification and seal of the now existing appropriate agency of the United States of America, and upon said presentment being made to the court, the United States of America will be allowed judgment in the amount of $34,593.43 and interest at the rate of 4% per annum from the dates of payment of each subsidy claimed.

WALLACE S. GOURLEY
Chief Judge

Opinion.

WALLACE S. GOURLEY, Chief Judge:

In this proceeding the United States of America seeks to recover meat subsidy payments based on the alleged failure of defendant to maintain appropriate records.

The matter comes before the court on defendant's motion to dismiss premised upon two theories:

1. The complaint does not charge defendant with violation of any substantive provision of the Emergency Price Control Act of 1942, its supplements or amendments.

2. The Reconstruction Finance Corporation did not conduct administrative proceedings with regard to defendant's meat subsidy claims as provided by law.

Our courts have recognized that regulations pursuant to which the instant proceedings was instituted require preservation of books and records by subsidy claimants, and that the Reconstruction Finance Corporation has the right to declare invalid any claim of an applicant who failed to comply with these requirements. Riverview Packing Co. v. Reconstruction Finance Corporation, 207 F. 2d 361, 3 Cir.

Such regulations, in effect, provide for payment on a preliminary basis, but the Reconstruction Finance Corporation reserves the right to require restitution of any payment or part of a payment upon a finding that the claim was invalid or defective. Riverview Packing Co. v. Reconstruction Finance Corporation, supra; Berchem v. Reconstruction Finance Corporation, 191 F. 2d 922 (U. S. Emergency Court of Appeals).

It is my judgment, therefore, that the Reconstruction Finance Corporation is vested with the authority to invalidate the claims which give rise to this proceeding.

Defendant finally objects that no administrative hearings were instituted by Reconstruction Finance Corporation in rendering its decision of invalidity.

The Emergency Price Control Act specifies with great particularity the procedure for involving administrative proceedings. 50 U.S.C.A. App. 923, 50 U.S.C.A. App. 924. Having failed to avail himself with the procedures provided under the Act, defendant is in no position to require hearings before the Reconstruction Finance Corporation. Reconstruction Finance Corporation v. Service Pipe Line Co. et al., 198 F. 2d 775, 10 Cir.

An appropriate Order is entered.

ORDER

AND NOW, this 19 day of January, 1956, the motion of the defendant, Rex Carpenter, to dismiss the within proceedings will be, and it hereby is, refused.

WALLACE S. GOURLEY
Chief Judge